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In the Supreme Court of the United States

OCTOBER TERM, 1978

TEXAS EDUCATION AGENCY (AUSTIN INDEPENDENT SCHOOL DISTRICT), ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals denying petitioner's request for rehearing en banc (Pet. App. 1-13) is reported at 579 F. 2d 910. The opinion of the court of appeals on remand from this Court (Pet. App. 14-44) is reported at 564 F. 2d 162. The opinion of the court of appeals on the issue of relief and on liability for discrimination against Mexican-Americans (Pet. App. 51-93) is reported at 532 F. 2d 380. The opinion of the court of appeals en banc as to liability is reported at 467 F. 2d 848. The memorandum opinions and orders of the district court as to liability and remedy (Pet. App. 94-131) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14-44) was entered on November 21, 1977. Petitioner's request

for rehearing en banc was denied on September 7, 1978 (Pet. App. 1-13) and the petition for certiorari was filed in this Court on December 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly complied with this Court's order remanding the case for reconsideration of its earlier conclusion that petitioner had engaged in intentional discrimination against Mexican-American students in the Austin schools.

STATEMENT

The United States instituted this school desegregation suit in the United States District Court for the Western District of Texas pursuant to Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6. On September 4, 1970, the district court entered an interim order directing petitioner to implement desegregation procedures in non-student assignment aspects of school operations.

Following a six-day trial in 1971 the district court held that petitioner had not discriminated against Mexican-Americans (Pet. App. 128-129), but that the dual school system historically maintained for blacks had not been eliminated (*id.* at 131). It entered an order approving a plan to close two predominantly black secondary schools and to reassign their students to predominantly Anglo schools (*id.* at 120-123).

The court of appeals, sitting en banc, reversed. Six judges joined an opinion detailing a history of discrimination by petitioner (*United States* v. *Texas Education Agency*, 467 F. 2d 848, 852-875 (5th Cir. 1972) (en banc) (hereafter referred to as *Austin I*)). These six judges concluded that petitioner had engaged in invidious discrimination against Mexican-Americans as well as blacks, and that the district court's findings were clearly erroneous. The other eight judges concurred in the result,

concluding that "discriminatory segregation exists against Mexican-American students and that the proposed part-time integration plan of the school district is inadequate as a desegregation plan" (*id.* at 885). The court remanded the case to the district court with directions to identify those schools that were segregated as a result of racial or ethnic discrimination and to eliminate the effects of the segregation by using specified desegregation techniques listed on a priority basis (*id.* at 884-885).

On remand the district court once more concluded that petitioner had not discriminated against Mexican-Americans (Pet. App. 100); it approved a plan to desegregate the sixth grade of the black elementary schools (*id.* at 107).

The court of appeals again reversed and held, for the second time, that petitioner had discriminated against both blacks and Mexican-Americans (Pet. App. 70), and that the partial desegregation plan approved by the district court for black students was constitutionally inadequate (*id.* at 73). The school district's petition for certiorari was granted by this Court and the judgment of the court of appeals was vacated and the case remanded for reconsideration in light of *Washington* v. *Davis*, 426 U.S. 229 (1976) (*id.* at 45-50).[1] The court

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[1] In our response to the certiorari petition in *Austin II*, we observed that it might be "useful" for this Court to remand the case for reconsideration in light of its intervening decision in *Washington* v. *Davis*, and thus, we did not oppose the granting of certiorari. See Brief for the United States, *Texas Education Agency* v. *United States*, No. 76-200, O.T. 1976 at 13. However, we also stated (*ibid.*) that if the Court

> were to undertake plenary review of this case, we would urge that the judgment of the panel be affirmed, in light of the evidence of extensive intentional discrimination against Mexican-Americans.

Because the court of appeals in *Austin III* correctly analyzed that evidence in light of *Washington* v. *Davis*, we believe further review by this Court is unwarranted.

of appeals, applying the criteria of *Washington* v. *Davis* and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), reaffirmed its earlier conclusion that petitioner had engaged in intentional discrimination against Mexican-Americans (Pet. App. 41), and remanded the case to the district court to reconsider a remedy in light of this Court's decision in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (*ibid.*).

ARGUMENT

The court of appeals has fully complied with this Court's mandate to reconsider its decision in *Austin II* in light of *Washington* v. *Davis* and its reaffirmance of *Austin II* is correct.

Petitioner contends that in reaffirming its two prior findings of intentional discrimination by petitioner against Mexican-Americans, the court of appeals failed to apply the standards set out in *Washington* v. *Davis* and *Arlington Heights* because the court has "again found unconstitutional segregation of Mexican-Americans solely by the application of a foreseeable consequences standard to disproportionate impact" (Pet. 2). That characterization of the court of appeals' opinion in *Austin III* is unfounded.[2] In fact, the court expressly acknowledged its duty under *Washington* v. *Davis* to ascertain whether the discrimination was purposeful, and in making that inquiry

[2]In view of the court of appeals' explicit rejection of a mechanical application of the foreseeable consequences test in *Austin III* (Pet. App. 8-9), we believe there is no need for this Court to stay action on this petition pending its decisions in *Dayton Board of Education* v. *Brinkman*, No. 78-627, O.T. 1978, and *Columbus Board of Education* v. *Penick*, No. 78-610, O.T. 1978, both of which challenge findings of discriminatory intent allegedly based solely on utilization of a foreseeable consequences test. The petitioners in *Columbus* and *Dayton* have also argued that the remedies in those cases do not comport with the guidelines articulated by this Court in its prior *Dayton* decision. However, the court of appeals has remanded this case to the district court for the specific purpose of affording it the opportunity to formulate a remedy in accordance with *Dayton*.

it looked to the types of evidence identified as relevant in *Arlington Heights* (Pet. App. 20-23).[3]

At the beginning of its opinion in *Austin III* the court of appeals made clear its understanding that disproportionate impact by itself will not support a finding of intentional discrimination (Pet. App. 26):

> *Washington* v. *Davis* and *Arlington Heights* did establish that the disproportionate racial impact of the neutral application of a long-standing neutral policy, by itself, will rarely constitute a constitutional violation. * * * We are well aware that some official actions on which a plaintiff hinges an allegation of unconstitutional discrimination have historically been motivated by racially and ethically neutral *bona fide* concerns, such as the desire to have children attend the school closest to their home, and no showing is made that those concerns were actually subordinate to, or a subterfuge for, unconstitutional discrimination. In those circumstances, that a discriminatory result was the natural and foreseeable consequence of

[3]In addition to mischaracterizing the basis for the court's decision in *Austin III*, petitioner throughout its brief misstates the issue under consideration on remand (Pet. 12-13, 19, 27). That issue was not—as petitioner erroneously claims—whether the school district had rebutted a prima facie showing of intentional discrimination against Mexican-Americans, but rather whether the evidence upon which the court relied in *Austin I* and *Austin II* demonstrated the requisite racially discriminatory intent to constitute a prima facie case. *Washington* v. *Davis* does not turn on rebuttable presumptions; its concern is with the prerequisites for a finding of invidious discrimination. In remanding *Austin II* for reconsideration in light of *Washington* v. *Davis* this Court presumably intended for the court of appeals to reexamine the record for evidence of improper purpose or intent and to make explicit its conclusions on that issue. The court of appeals dutifully carried out that task, and petitioner's incorrect contention that the "real question in the case" (Pet. 13) is whether it has rebutted a prima facie showing should not obscure the substantial evidence of segregative intent identified by the court of appeals.

the actions is insufficient to infuse the challenged acts with the type of discriminatory intent required by *Washington* v. *Davis* and *Arlington Heights*.

While recognizing that disproportionate impact standing alone is not dispositive on the issue of discriminatory intent, the court of appeals heeded this Court's suggestion in *Arlington Heights, supra*, 429 U.S. at 266, that such an impact is "an important starting point" in determining intent (Pet. App. 32). Thus, the court began its factual analysis in *Austin III* by pointing out the substantial degree of racial isolation of Mexican-Americans that persists in the Austin schools where almost 40% of the Mexican-American students attend schools where the minority enrollment exceeds 90% (*id.* at 31-33). The court then turned its attention to the other evidentiary factors held relevant in *Arlington Heights* on the issue of discriminatory intent.[4]

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[4]In discussing the facts (Pet. 19-27), petitioner implies that the court of appeals usurped the fact-finding function of the district court. That suggestion is incorrect. The court of appeals explicitly states in its opinion in *Austin III* and in its opinion denying the petition for rehearing that it is reversing because the district court employed an erroneous legal standard in finding no intentional discrimination against Mexican-Americans (Pet. App. 10, 34-35 n.17). Alternatively, the court holds that even under the "clearly erroneous standard" the district court's finding of no intentional discrimination would warrant reversal (*ibid.*). Thus, the court in *Austin III* exercised what this Court in *Dayton Board of Education* v. *Brinkman, supra*, 433 U.S. at 417-418, has identified as the proper function of an appellate court:

> On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors.

Looking first to "the historical background" of official actions taken by petitioner with respect to Mexican-Americans, *Arlington Heights, supra*, 429 U.S. at 267, the court of appeals found the evidence—both direct and circumstantial—to demonstrate pervasive purposeful segregation of Mexican-American students in the Austin school system dating back six decades (Pet. App. 34-38).[5] That segregative race consciousness rather than race neutrality motivated petitioner's actions was apparent to the court from such evidence as (1) the construction of Comal Street School specifically for those Mexican-Americans attending the only three schools in the district having more than twenty Mexican-American students; (2) the construction of Zavala School "to provide for the large group of Spanish-speaking citizens of Austin, a suitable well-equipped building as near the center of this population as possible" and (3) the removal of all but one Mexican-American pupil from Winn School in response to a complaint from Anglo parents about "Mexican" pupils at Winn (Pet. App. 9, 35-37).[6]

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[5]Petitioner attempts to minimize the significance of the evidence on which the court relies in *Austin III* by pointing out that it was "set out in the minority opinion in *Austin I*" (Pet. 19, 20), a case which petitioner claims "was decided under an erroneous legal standard" (*id.* at 19).

The importance of the facts cited in *Austin III* is in no way diminished by their having first appeared in an opinion in which only six of the fourteen judges sitting en banc in *Austin I* joined. The other eight judges fully agreed that petitioner was guilty of intentional discrimination against Mexican-Americans and disagreed only as to the appropriate remedy. Moreover, even if petitioner were correct that the court applied an erroneous legal standard in *Austin I*, the error would be in the standard, not in the facts to which it was applied.

[6]The court of appeals also pointed out that the Mexican-American school had attendance zones overlapping those of predominantly

Petitioner maintains that the district court was correct in excusing these acts of segregation as "a humane and compassionate attempt by the School District * * * to meet the special education needs" of Mexican-American children (Pet. 22). The court of appeals properly rejected that contention for the third time in *Austin III* (Pet. App. 34 n.17). Racial animus is not a prerequisite to a finding of invidious discrimination. In the years prior to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), separate schools, housing, and other facilities for blacks and whites were also thought by some to be in the best interests of both races. But such "humane" considerations are not controlling where equal protection has been denied. See *Buchanan* v. *Warley*, 245 U.S. 60, 80-81 (1917). Moreover, as the court pointed out in *Austin III*, bilingual instruction for Mexican-American students was introduced only comparatively recently in the Austin schools; it certainly could not have justified the establishment of separate schools for Mexican-Americans at a time when teachers were prohibited by state law from conducting classes in Spanish (Pet. App. 34-35 n.17).[7]

In addition to the direct evidence of intentional discrimination reflected in the historical background of

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Anglo schools (Pet. App. 34-35).

Much of this direct evidence of segregative intent is contained in petitioner's own documents and records. Such contemporaneous statements are "highly relevant" in illuminating a decision-making body's intent. *Arlington Heights*, *supra*, 429 U.S. at 268.

[7]Petitioner strains to transform its "humane and compassionate use of then accepted and proper educational techniques" (Pet. 14) into the sort of neutral "purpose the government is constitutionally empowered to pursue" approved in *Washington* v. *Davis* (Pet. 14-15). But this effort to blur the conceptual distinction between "benign motive" and neutral purpose must fail. A neutral purpose is by definition a non-racial purpose. Here the alleged "benign motive" was blatantly racial: its express object was to group Mexican-American children in separate schools on the theory that they would do better in such segregated facilities. Governments are not constitutionally empowered to maintain dual school systems in the belief that it is beneficial to educate the races separately.

the school district's policies toward Mexican-American students, the court of appeals in *Austin III* found considerable circumstantial evidence of segregative intent in other actions by petitioner, including its decisions pertaining to school construction and abandonment, *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 21 (1971), and teacher assignment, *Swann*, *supra*, 402 U.S. at 18.[8] For example, when Johnston Senior High School and Martin Junior High School were built, the district selected sites that maximized Mexican-American enrollments and it rejected more central locations that would have produced less isolation (Pet. App. 38).[9] Overcrowding in predominantly Anglo elementary schools was alleviated by building new schools, but overcrowding in the Mexican-American schools was alleviated by the use of portable classrooms (Pet. App. 38 & n.18).

The court of appeals pointed out that the school district has for the most part assigned its few Mexican-American teachers to schools with predominantly Mexican-

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[8]Petitioner asserts that decisions as to construction, abandonment, site selection, and attendance zones are but "elements of the neighborhood school policy" (Pet. 16), but the court of appeals properly recognized that such decisions have in fact been devices for manipulating a facially neutral "neighborhood school" policy to create and maintain segregated schools (Pet. App. 33). In the face of that finding "the mere assertion of * * * a [neighborhood school] policy is not dispositive." *Keyes* v. *School District No. 1*, 413 U.S. 189, 212 (1973).

[9]The rejection of alternatives that would have had a less segregative impact or no such impact is highly probative on the question of intent. See *United States* v. *School District of Omaha*, 521 F. 2d 530, 538 n.13, 540 n.20, 542-543 (8th Cir.), cert. denied, 423 U.S. 946 (1975); *Morales* v. *Shannon*, 516 F. 2d 411, 413 (5th Cir.), cert. denied, 423 U.S. 1034 (1975); *Oliver* v. *Michigan State Board of Education*, 508 F. 2d 178, 182, 184-187 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975). See generally Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L. J. 317 (1976).

American enrollments, thereby reinforcing the segregated identity of those schools (Pet. App. 39). When desegregation plans were implemented for black students in Austin in 1955 and the 1960's they permitted black students to transfer to Mexican-American schools but not to Anglo schools, and "Mexican-Americans were invariably assigned to black schools but not Anglo schools" (Pet. App. 40).

As this Court recognized in *Arlington Heights, supra,* 429 U.S. at 266, on occasion "a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action" even where the governing policies appear neutral on their face. In the instant case the record contains evidence not only of facially neutral policies carried out in a way that increased the isolation of Mexican-American students, but of non-neutral, explicitly racial policies directed to that end. While it may be that no single decision by the school district compels the conclusion that it engaged in pervasive intentional discrimination against Mexican-Americans, an examination of the whole range of evidence deemed relevant in *Washington* v. *Davis* and *Arlington Heights* leads inexorably to that conclusion. In *Austin III* the court of appeals conducted such an examination and found substantial evidence of invidious intent. Further review by this Court is unwarranted.[10]

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[10]Petitioner also challenges the court of appeals' remand to the district court for reconsideration of an appropriate remedy in light of this Court's decision in *Dayton Board of Education* v. *Brinkman*. In *Dayton, supra,* 433 U.S. at 420, it was held that where constitutional violations are found in a school desegregation case,

> * * * the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the * * * school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.

The district court has not had an opportunity to apply that standard in this case. Indeed, it has not even considered a remedy for the desegregation of the Mexican-American schools. In these circumstances, the court of appeals was entirely correct in sending the case back to the district court for its consideration of the question of appropriate relief. There is no reason for this Court to deal with that issue at this time.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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